percent penetration of cable households. If distributors serving less than 50 percent of all cable homes are not carrying a particular program service, clearly they are finding other services equally as good for their purposes, i.e., substitutable. Therefore, services with below 50 percent penetration (calculated based on full-time subscribers) cannot have the impact on competition proscribed by Section 628. The Commission should provide a safe harbor from application of Section 628 for any such services.

3. Start-up services. The Commission acknowledges the special needs of start-up services in paragraph 36 of the Notice. Central to the achievement of diversity and program innovation[26] is the avoidance of any barrier to or burden upon the ability of new programmers to enter the business, develop customers and audiences, and experiment with delivery methods and business arrangements. New services must have the flexibility to offer differentiated pricing, exclusivity, and other inducements to encourage distributors to carry and aggressively market the service.

The Commission should not, however, restrict the safe harbor for new services to a particular time frame. To do so would neglect the complicated dynamics of starting a program service

---

[26] See 47 U.S.C. Sec. 548(a); see also Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962, 5060-5061 (1990); Florence Setzer and Jonathan Levy, Broadcast Television in a Multichannel Marketplace, OPP Working Paper Series 26 at 1 (June, 1991).

and achieving success in the marketplace. Some start-up services may achieve success in a brief period, say two years. Other services may take substantially longer. A service that has been in existence for five years, but has not yet achieved an acceptable level of penetration, has the same need for flexibility to encourage carriage by distributors as when it was only a year old. Again, penetration may be a relevant factor.

Also, the Commission should include within this safe harbor services which are new to the marketplace but also those services that are so substantially revised in format or content as to constitute a relaunch or rebirth of the service. A start-up should not be defined solely in terms of the temporal newness of the service, but should include services that, while no longer "new" are nonetheless "developmental," in that their content and format are undergoing, or have recently undergone, a change of fundamental significance. Such services, just like "new" services, need leeway to induce carriage and marketing by distributors.

The Commission can readily identify criteria that would qualify a service for the developmental or relaunch safe harbor. Landmark believes the following criteria, among others, would be useful in this regard: significant new programming or substantial investment in improved programming, different advertising focus and target groups, different marketing strategy, revised program scheduling practices, significant promotional effort associated with the relaunch, and increased staffing.

4. Services with relatively low viewership. Similarly, a relatively low level of viewership indicates that a program service may not be unusually valuable in driving penetration. As a result, a distributor cannot reasonably claim that carriage of the service is necessary to its competitive survival. Thus, the Commission should create a safe harbor for those services whose viewership levels are such that they could not have the impact on competition in the marketplace required under Section 628(b).

5. Vertical integration with smaller MSOs. The concern in the Cable Act with respect to vertical integration of programmers and cable systems is focused on such integration involving the major MSOs.[27] Whatever the merits of that concern as to the major MSOs, it is not applicable to smaller MSOs, such as TeleCable.

First, even assuming arguendo that any cable programmer affiliated with an MSO is likely to engage in anticompetitive practices to benefit a commonly-owned cable system, a programmer affiliated with a smaller MSO would be economically incapable of sustaining any such practices. Landmark could not survive as a programmer by serving only or even principally TeleCable systems which, in the aggregate, serve no more than 1.2 percent of cable households. Rather, Landmark must look to unaffiliated distributors for the majority of the carriage that its program services require in order to be viable. In fact, The Weather Channel serves over 53 million cable subscribers and over 1.2

---

[27] See supra note 12.

million HSD, MMDS and SMATV subscribers, compared with TeleCable's 685,000 subscribers. It is economically impossible for programmers to adopt practices in the national markets in which they operate as video programmers designed to confer anticompetitive benefits on their relatively small vertically integrated cable operations, since any benefits of such practices accruing to the cable operations could never outweigh the costs of such practices to the nationwide programming operations.

The only way a programmer affiliated with a small MSO could impact competition in the MSO's markets is with very targeted policies limited to those markets. However, such targeted policies would be easily detectable. Moreover, such a scenario is inconsistent with current facts. TeleCable operates in two markets with MMDS competition, and three markets with cable overbuilds. In each of these markets, The Weather Channel is distributed by all rival distributors.

TeleCable is simply too small to block or significantly hamper development of substitutes to The Weather Channel or the Travel Channel. There can be no serious argument that the existence or availability of competitive substitutes for The Weather Channel and The Travel Channel could be meaningfully affected by any action of Telecable, a cable MSO that serves only 1.2 percent of cable households: a would-be competitor of The Weather Channel or The Travel Channel could not require or depend upon access to TeleCable systems for its survival.

For these reasons, the Commission should establish a safe harbor from application of Section 628 for vertically integrated MSOs below a stated size expressed in terms of share of total cable households. In setting such a threshold, useful reference may be made to Section 4.1 of the Department of Justice Vertical Restraint Guidelines, which establishes 10 percent market share as a threshold below which no competitive concern is presented by vertical integration. While the Commission might, out of an excess of caution, choose a threshold lower than 10 percent, the 1.2 percent share of cable households served by Telecable certainly would fall below any rational threshold because it is incapable of having more than a de minimis effect on the marketplace.

V. Conclusion

For the foregoing reasons, Landmark respectfully recommends that the Commission adopt rules under Section 628 of the Act consistent with the comments herein.

Respectfully submitted

LANDMARK COMMUNICATIONS, INC.

Michael H. Hammer

Michael H. Hammer
Brian Conboy

Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3302

Its Attorneys

January 25, 1993